

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD B. BURTON, JR.)	
Claimant)	
VS.)	
)	Docket Nos. 236,797; 236,798;
ELECTRICAL CORPORATION OF AMERICA)	236,799 & 236,800
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY,)	
INSURANCE COMPANY OF NORTH AMERICA and)	
BUILDERS' ASSOC. SELF INSURANCE FUND)	
Insurance Carriers)	

ORDER

Respondent and Insurance Company of North America (CIGNA), one of respondent's insurance carriers, appeal from a preliminary hearing order dated November 25, 1998, granting claimant's request for preliminary benefits. The Preliminary Decision, entered by Administrative Law Judge Robert H. Foerschler, ordered two insurance carriers for respondent, CIGNA and Liberty Mutual Insurance Company (Liberty Mutual), to split the cost of those preliminary benefits.

ISSUES

In their Application for Review by Workers' Compensation Board of Review, respondent and CIGNA stated:

The respondent specifically asserts as jurisdictional grounds for the review, and at issue in this appeal, is whether the claimant sustained an accidental injury arising out of, and in the course of his employment for which the insurance carrier, Insurance Company of North America, should be 50% responsible for the medical and temporary total as ordered by the Administrative Law Judge. Clearly, one carrier or the other, should be on the risk at the time of the work-related injury, and the Administrative Law Judge exceeded his authority in ordering a 50/50 split of payment between the two carriers.

But in their brief, respondent and CIGNA concede the issue is simply a dispute between insurance carriers, not a dispute concerning the compensability of claimant's injuries. "This case boils down to an argument between insurance carriers over which entity is liable for the claimant's medical treatment and temporary total disability."

Respondent and CIGNA's brief also states:

The Order of Administrative Law Judge Foerschler ordering the two carriers to split liability 50-50 amounts to "splitting the baby" and is not justified under the facts of the case or the Kansas Workers' Compensation Act. Clearly, one carrier or the other should have full liability for the claimant's care and treatment and temporary total, it is impossible for both to be liable.

Thus, although respondent and CIGNA attempt to describe the issue as one of compensability, it is clear from the briefs that the issue is really the date(s) of accident for the sole purpose of determining which of respondent's insurance carriers should initially pay for the preliminary benefits ordered. This is also what counsel represented to the Court at the preliminary hearing.

Respondent and Liberty Mutual raise an issue concerning the Appeals Board's jurisdiction to decide this issue on an appeal from a preliminary hearing order because respondent and CIGNA do not deny the compensability of a June 10, 1998 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes that the Administrative Law Judge did not exceed his jurisdiction in granting the relief requested at the preliminary hearing.

There is no dispute concerning the compensability of claimant's injury. The Administrative Law Judge ordered the two insurance carriers to share the expense of the preliminary hearing benefits because "it cannot be determined at this time what injury the proposed treatment is needed to relieve. . . . Apparently, the need is related to injuries sustained when either Liberty Mutual or Cigna Insurance were on the risk for the same employer."

As respondent and Liberty Mutual point out in their brief, K.S.A. 1998 Supp. 44-551(b)(2)(A) limits the jurisdiction of the Appeals Board to review preliminary hearing orders only in cases where one of the parties has alleged the Administrative Law Judge exceeded his jurisdiction. This jurisdiction includes the specific issues identified in K.S.A. 1998 Supp. 44-534a. A contention that the Administrative Law Judge has erred in his finding that the evidence shows a need for surgery to relieve the claimant from the effects of one or another or more than one injury that claimant sustained while working for the

same employer is not an argument the Appeals Board has the jurisdiction to consider on an appeal from an order entered pursuant to K.S.A. 1998 Supp. 44-534a.

The arguments pertain to what date of accident should control for purposes of determining which insurance carrier is liable. This does not give rise to a disputed issue of whether claimant's injury occurred as a result of an accident which arose out of and in the course of claimant's employment with respondent. Regardless of which date of accident (or accidents) is found to be the precipitating cause for claimant's surgery, it does not alter the fact that the injury (or injuries) is the result of claimant's employment with respondent. That fact appears to be undisputed.

The Appeals Board likewise finds it does not have jurisdiction of this appeal from a preliminary hearing order because respondent and CIGNA's arguments also fail to raise a jurisdictional defense. The Appeals Board has previously held that the certain types of defenses contemplated by K.S.A. 44-534a(a)(2), are defenses which go to the compensability of the claim. See, Cockerham v. Nichols Fluid Service, Docket No. 201,867 (Feb. 1996). As indicated above, the issues raised by this appeal do not fall within that category. Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review at this juncture of the proceedings the preliminary hearing order entered by Administrative Law Judge Robert H. Foerschler, dated November 25, 1998, and that this appeal should be, and the same is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

c: Frank D. Eppright, Kansas City, MO
Stephanie Warmund, Overland Park, KS
Michael W. Downing, Kansas City, MO
C. Anderson Russell, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director